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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

DORRIS MOTOR CAR COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

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THE UNITED STATES, *Appellee.*	

BRIEF FOR APPELLANT.

GROUNDS OF JURISDICTION.

This appeal from the Court of Claims was filed in this Court on January 9, 1925 (R. 23) and as the amount involved is $21,147.67, this Court has jurisdiction of the appeal.

STATEMENT OF THE CASE.

Appellant brought this suit in the Court of Claims to recover $21,147.67 for profits it would have made had it been allowed to continue production under a war contract for the length of time allowed by the contract.

The Court of Claims gave judgment against the appellant.

The essential facts as set forth in the findings of fact made by the Court of Claims (R. 13 to 20) are in essence that on October 5, 1918 the plaintiff entered into a contract in writing with the United States acting through the Ordinance branch of the War Department, which said contract is contained in the record (R. 3 to 12) and made a part of the findings of fact of the Court of Claims (R. 13, finding 2).

The contract provided that the appellant should manufacture and deliver to the United States 1450 Liberty Motor Governors, which were manufactured and delivered to the United States and paid for and which do not enter into this case, and the contract also provided that appellant should manufacture and deliver to the United States 1450 Liberty Motor Petrol Air Pumps. None of the Petrol Air Pumps were delivered to the United States.

When appellant was proceeding with the manufacture of the Petrol Air Pumps the United States on December 14, 1918 notified the appellant to suspend operations under its contract. Appellant protested, but did suspend operations on December 17, 1918. (Finding IV, R. 14.)

There was a termination clause in the contract (Article XIV, R. 9) which provided that the Chief of Ordnance might notify the appellant that any of the articles contracted for should not be manufactured or delivered at any time, but provided also that "*in the event of such complete or partial termination the United States* shall inspect all completed articles then on hand *and such as may be completed within thirty days after such notice,* and shall pay to the contractor the price hereunder fixed for all articles accepted by and delivered to the United States." (Italics ours.)

The United States refused to allow the company to proceed with production for thirty days under the above quoted clause of the contract, but insisted that operations should cease at once upon the notice of December 14, 1918. (R. 14, Finding IV.)

The Court of Claims found that if the appellant had been allowed to proceed for thirty days after December 14, 1918, it would have earned a profit of $21,147.67. This finding is in the following language:

> "On December 14, 1918, plaintiff was ready, able, and willing to perform the work contemplated by the con-

tract and could have completed the same within thirty days from that date. Upon completion of the work in accordance with the contract its profit would have been $21,147.67." (R. 20, last paragraph.)

The question presented to this court is whether the United States was justified in law in refusing to allow the appellant to proceed for thirty days after notice of termination of the contract, as the above quoted provision of the contract provided appellant should have the right to do. If not, it is obvious appellant is entitled to be placed in the same position it would have been had it been allowed to proceed for said thirty days and is entitled to recover the sum of $21,147.67.

SUMMARY OF POINTS.

1. *The opinion of the Court of Claims is unsound.*

2. *The right to recover profits is elementary.*

3. *The war legislation authorizing the termination of certain contracts does not apply in the instant case.*

4. *Appellant is entitled to the profit it would have made if it had been allowed to proceed under its contract.*

I.

The opinion of the Court of Claims is unsound.

The opinion of the Court of Claims (R. 21, 22) assigns three reasons for giving judgment against the appellant. Those reasons are (1) the "contract provided for its termination * * *. The action in terminating the contract should be referred to the powers given in that regard by the terms of the agreement, and such action being authorized, no presumption is to be indulged that the termination was a breach"; and (2) "Plaintiff, when requested to suspend operations, agreed to suspend and did suspend, and the parties proceeded to an ascertainment of the amounts which should be paid plaintiff in accordance with the terms of the contract. This mutual agreement to suspend followed by an actual suspension was an effectual waiver of plaintiff's right to proceed," and (3) "Not only this, but when the claim of amounts to be allowed was at issue, plaintiff accepted the award of the Claims Board as approved by the Ordnance Claims Board. It executed a supplemental agreement intended to carry the settlement into effect. Among other recitals in the supplemental agreement is one in which plain-

tiff waived any and all rights to a specific notice of termination or to continue the performance of the original contract to any extent after the receipt of such notice. It was then paid the sum of $16,279.21 and having received this sum in the circumstances stated, it cannot now recover more."

The contract's provision for termination.

The first reason assigned by the Court of Claims is that the action of the Government in terminating the contract was authorized by the terms of the agreement.

We do not read the agreement as authorizing the immediate termination of the contract by the Government at any time. The provision for the termination of the agreement must be read as a whole and that provision (R. 9, Article 14) reads in part as follows:

> "In the event of such complete or partial termination the United States shall inspect all completed articles then on hand *and such as may be completed within thirty days after such notice* and shall pay to the contractor the price herein fixed for all articles accepted by and delivered to the United States." (Italics ours.)

It is obvious that the above provision of the contract did not provide for its immediate termination and did not authorize the United States to terminate it at once, but provided that after notice of termination the appellant should have thirty days during which to continue production. The Court of Claims has found that appellant could have completed the contract within said thirty days. If it had been allowed to proceed for the time stated in the contract it would have made the profit now sued for. Obviously, then, the United States cannot claim that its action was justified by the termination provision of the contract, and the opinion of the Court of Claims so far as it is based upon this provision is clearly unsound.

The claim that appellant when requested to suspend operations did so.

The second reason assigned by the Court of Claims for its judgment is that the appellant when requested to suspend operations agreed to suspend and did suspend.

The finding of the Court of Claims (R. 14, finding IV) shows that appellant protested and called attention to its right to proceed for thirty days under the contract, but the War Department insisted on the immediate suspension of operations notwithstanding this thirty day clause.

The obvious reply to this reason assigned by the Court of Claims for its judgment is that the appellant was bound by law to suspend operations when requested to do so by the other party to the contract. It is an elementary rule that one may not make damages by proceeding with work when directed by the other party to suspend. (Damages, 8 R. C. L. Section 14, P. 442) also (Damages 17, C. J. Section 96, P. 767.)

The Court of Claims itself has stated in *Yates* v. *United States*, 15 C. Cl. 119, 125, this rule of law as follows:

> "The renunciation of a contract by a defendant where the other party has a right to perform stops performance and precludes claimant from making damages by proceeding with his work."

This Court said in *Warren* v. *Stoddart*, 105 U. S. 224, 230:

> "The rule is, that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertion, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

It is a matter of mathematical computation that even if the Government be compelled to pay the anticipated profit sued for in this case it is saved the sum of $11,807.90 by the sus-

pension of this contract. If appellant had proceeded for thirty days it would have collected the anticipated profits and also the sum of $11,807.90 in addition to what has been paid to date. (This is a matter of mathematical computation from the total contract price.)

The Court of Claims cites as the reason for its conclusion that "this mutual agreement to suspend, followed by an actual suspension, was an effectual waiver of plaintiff's right to proceed," the case of *Savage Arms Co.* v. *United States*, 266 U. S. 217. This was a case where the United States suspended a contract and thereafter the United States and the company entered into a new agreement providing for the delivery of a lesser amount of articles. It was a clear case of novation. Such is not the case here. There was no new agreement entered into in this case providing for the delivery of a lesser amount of articles than originally contracted for. There was merely a suspension of the contract by the United States and the appellant's protested acquiescense in this suspension which it was bound by law to give.

Appelant's acceptance of the award of the claim's board.

The Court of Claims next states as its final reason for giving judgment against the appellant that the appellant accepted the award of the Claims Board in the amount of $16,279.21 "and having received this sum in the circumstances stated, it cannot now recover more."

The award of the Claims Board is set out in the findings of fact. (R. 18.)

The award is headed "Matter of Partial Settlement of Claim of Dorris Motor Car Company." The first paragraph of the award reads as follows:

> "The United States shall forthwith pay to the contractor *in partial settlement* of its claim the sum of $16,279.21, made up as follows:" (Italics ours.)

The award itself states that it is only in "partial settlement" of the claim and it does not purport to be in complete settlement. To say that it was in complete settlement is to wholly disregard the words "partial settlement" which were used in the award itself.

The Court of Claims cites three cases in support of its conclusion, and having read them all we are at loss to apprehend in what manner any of them has any application whatever to the facts of the case at bar. In none of them were payments made and accepted stated to be in partial settlement only.

The settlement contract which the Court of Claims refers to in its opinion as having been executed with the intention of carrying the award into effect is found in the record. (R. 15 to 18.) It is recited therein that it is in the public interest to amend the original contract and that the execution "of this supplemental contract" is in the financial interests of the United States.

This partial settlement contract was made April 19, 1919, and the notice to suspend was dated December 14, 1918 and more than thirty days having passed from the date of the suspension notice, appellant had then no right to proceed with production, and hence, the provision of paragraph 2 of this contract waiving "any and all rights that it may have under the provisions under the original contract to a specified notice of termination or to continue the performance thereof to any extent" waived nothing, because the notice of termination had been given and four months having passed since the date of that notice there was then existing no right in the appellant to continue production or to any further notice. This contract expressly reserved the right to assert an additional claim against the United States and provided that the amount paid was only paid in satisfaction of the items expressly named, and further provided in paragraph 5 for the payment of further sums to the appellant by the United

States. Annexed to it was the award of the Claims Board which states that it is in partial settlement of the claim. It was obviously the intention of the parties to reserve this matter of profits for litigation by the appellant and the contract was obviously drawn for the purpose of not baring the due presentation of this claim. The uncontradicted evidence showed that the only items in controversy when this settlement contract was signed were the profits and the overhead items.

II.

The right to recover profits is elementary.

That the right to recover profits is elementary needs no argument in this court. (See *United States* v. *Behan*, 110 U. S. 338, 344; *United States* v. *Purcell Envelope Company*, 249 U. S. 313; *United States* v. *Spearin*, 248 U. S. 132.)

III.

War legislation did not authorize the termination of this contract.

It was not claimed in the Court of Claims that war legislation authorized the termination of this contract. The Court of Claims in its opinion makes passing reference to the case of *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, but does not base its decision upon that case.

We have carefully examined the war legislation and the only statutes which we have found which confer power to cancel contracts are the Acts of March 4, 1917, June 15, 1917 and July 1, 1918. These Acts confer upon the President the power to suspend or cancel or alter certain contracts under certain circumstances.

The Act of March 4, 1917, may be put to one side because it was limited in its authority to March 1, 1918, and the contract in the case at bar was entered into on October 5, 1918.

The Act of June 15, 1917, which was before this Court in the case of *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, under the heading "Emergency Shipping Fund" conferred upon the President the power "to modify, suspend, cancel or requisition any existing or future contract for the building, production or purchase of ships or material." The Liberty Motor Petrol Air Pumps were not ships or parts thereof and the Act of June 15, 1917, defined material as follows: "The word material shall include stores, supplies and equipment for ships, and everything required for or in connection with the production thereof."

The contract in the case at bar was entered into by the Ordnance Branch of the War Department and probably the Petrol Air Pumps were designed for use in Liberty Motors employed in tanks used by the Tank Corps. They did not come within the definition of material embraced in the Act of June 15, 1917, which by its terms disclosed the intent of Congress to apply to contracts for ships or materials for ships only. It is limited to naval contracts and did not apply to War Department contracts.

We now come to the Act of July 1, 1918, which was entitled "An Act Making Appropriations For the Naval Service For the Fiscal Year Ending June 30, 1919, and For Other Purposes." The Act began "Be it enacted that the following amounts be and they are hereby appropriated * * * *for the naval service,*" (italics ours).

The Act empowered the President "within the limits of amounts appropriated therefor to modify or cancel any existing contract for the building, production or purchase of ships or war material."

This Act apparently only applied to contracts payable from appropriations made for the naval service.

These statutes are all statutes conferring a right which did not exist at common law and being in derogation of the common law, must be construed strictly. This court said in *Shaw* v. *North Pa. R. R. Co.*, 101 U. S. 557: "No Statute is to be construed as altering the common law further than its words import."

It is to be noted that the Act of June 15, 1917, conferred a power with reference to "existing or future contracts," while the later Act of July 1, 1918, intending to confer a power with respect to the same subject matter, eliminating the words "or future" and conferred the power only with respect to "any existing contract." The elimination of these words is significant. The general rule in such cases is stated by the Indiana Supreme Court in *Daley* v. *Pugh*, 131 N. E. 836, at page 838, as follows:

> "It is well settled that where a statute is amended or re-enacted in different language, it will not be presumed that the difference in the two statutes was due to oversight or inadvertence on the part of the legislature; on the contrary it will be presumed that the language was intentionally changed for the purpose of affecting a change in the law itself."

Wholly aside from the change in the language of the two acts, the word "existing" when considered in connection with the rule that statutes in derogation of the common law are to be strictly construed, cannot be held to apply to a contract which was not an "existing contract" at the time of the passage of the Act.

A statute with reference to "existing" rights of way was held to apply only to such rights of way as were existing at the time of the passage of the statute, and not to those coming into existence afterwards. *Simpson* v. *Boston & M. R. R. Co.*, 176 Mass. 359; 57 N. E. 674.

However, as we have said, these acts throughout are limited by their terms to contracts provided for by naval appropriations and do not apply to war department contracts.

It is unnecessary to consider whether the United States had a right under existing law to terminate this contract, because if such right had been given by law to any executive officer of the Government it would have been at most an optional right. A statute of this character from its very nature could not have been mandatory, but from necessity would have vested in the officer an option to apply it or not to apply it.

At the date of making the contract at bar, it will not be presumed that officers of the Government did not know the effect of existing law upon their right to terminate the contract, but on the contrary it must be presumed that they knew the law. It necessarily follows that if they had any right under the law to terminate it, they knew it at the time, and when they specifically provided in the contract for a specific method of terminating it, they thereby excluded all others, and bound the Government to exercise the right to terminate the contract as expressly provided for, and in accordance with that provision.

The rule of law applicable here is thus stated in *Beck & Sons* v. *Economy Coal Co.*, 149 Iowa 24; 127 N. W. 1109, 1111, where it is said:

> "These express grants clearly negatived any implied one which might otherwise arise under the maxim '*Expressio Unius Est Exclusio Alterius.*' The expression of one is the exclusion of another. *Hern* v. *Mains*, 20 Wall. 493; 22 L. Ed. 395; *Thomas* v. *West Jersey Co.*, 101 U. S. 82; 25 L. Ed. 950. This rule it will be observed is applicable to contracts as well as to statutes and it seems to me is quite controlling here. The grant was for an express purpose and it confines the use of entries and tracts to these purposes. All others were by necessary implication excluded."

The United States having expressly bound itself to terminate the contract in a particular manner, excluded the right to terminate it in any other manner.

Even had the contract contained an express provision in the very words of these unapplicable statutes, yet if following that provision, there had been the qualification that the United States would take such articles as the contractor should complete within thirty days after such notice of termination, the appellant would clearly have had the right to proceed with production for thirty days after receipt of the termination notice.

It is true that existing law is a part of the contract as a general rule, but this is subject to the qualification that it is not a part of the contract to the extent that the contract shows an intention to depart therefrom. (106 Min. 129; 118 N. W. 666.) The rule must not be overlooked that a contract will be construed most strongly against the party preparing it. In this case the Government prepared the contract. It was printed in the printing office and is on a standard ordnance department form.

Assuming (but not conceding) that the Government had a right to terminate this contract under any existing law and that this right would have been implied in the contract had no method of termination been expressed in the contract, yet the expression of one method of termination excluded all others and prevented their implication.

The rule is tersely and lucidly stated in *Thomson Electric Welding Co.* v. *Peerless Wire Fence Co.*, 190 Mich. 496; 157 N. W. 67, 69, where it is said:

> "The expression in a contract of one or more things in a class, applies to the exclusion of all not expressed, although all would have been implied had none been expressed."

In *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1-22, it is said:

> "While the special act is silent with reference to the revocation of contracts to supply water, we think the maxim '*Expressio Unius Est Exclusio Alterius*' is applicable, and that it was clearly the intention of the legislature to supersede the general law in that particular."

Moreover, it should be borne in mind that there was no attempt by the President or by anyone purporting to act for him to cancel the contract under war legislation nor has anyone up to the present writing attempted to justify the cancellation of this contract by war legislation.

IV.

Appellant is entitled to the profit it would have made if it had been allowed to proceed under its contract.

We have previously cited the authorities which support the holding that appellant is entitled to profits. A case awarding profits in the Court of Claims under a war contract is *Broadbent Portable Laundry Co.* v. *United States*, 56 C. Cl. 128.

At first consideration the profits in this case may seem somewhat high, but it is common knowledge that during war time money might have been invested at eight per cent or even nine per cent in securities of the best industrial corporations, and under these conditions it could hardly be expected that capital would embark upon business and assume the incidental risk without being compensated therefor. Moreover, it has been shown by the evidence that a large loss was sustained on another contract of the company, that the profit on the rest was very small, and it is a matter of every day manufacturing experience that one contract will show a fair profit, while another may show a loss, and considerable lee-

way must be allowed in contracts which show a profit in order to offset those contracts upon which loss is realized.

This Court takes judicial notice of public laws and knows that the war profits taxes, as high as eighty per cent, prevailing during this period, prevented any corporation realizing exorbitant profits.

The Court of Claims states in its opinion that if the defendant be compelled to pay these profits it is difficult to see what benefit it can take under the termination clause. The obvious answer is that if the termination clause had literally been followed the appellant, as found by the Court of Claims, would have completed the contract and would have received the entire contract price which sum would not only have included the items spent to the date of the suspension, but also the profit here sued for, and in addition the sum of $11,807.90, which is the difference between the two items mentioned and the total contract price. This sum represented the cost of completing the contract and it would have paid appellant's rent, officers' salaries and overhead expense for the period necessary to complete the contract so that appellant not only lost the profits it would have made, but also lost the advantage of having its overhead carried by this contract for the period necessary to complete it.

It is worthy of note that in finding 5 (R. 15) the Court of Claims finds that the Local Claim Board at St. Louis approved the item of profit which is sued for in this suit, but their action was disallowed at Washington. The representatives of the Government who were on the field of action and who understood the situation recommended this claim for payment.

The reason for the action at Washington in disallowing the claim is expressed in the opinion of the Board of Contract Adjustment (Vol. 4, Decisions Board of Contract Adjustment, page 729) to be merely that the supply circulars

exclude anticipated profit as an element in the settlement of contracts. Obviously this is no legal reason whatever for denying the claim.

For the foregoing reasons we respectfully request that the judgment of the Court of Claims be reversed.

All of which is respectfully submitted.

Dated January 16, 1926.

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